COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

APPLE FARM ESTATES, LLC Appellant	)	
v.	)	No. 04-26
MEDWAY BOARD OF APPEALS, Appellee	)	

RULING ON MOTION TO DISMISS

The developer, Apple Farm Estates, LLC, has appealed the decision of the Medway Board of Appeals to deny a comprehensive permit.

On December 9, 2004, the Board filed a Motion to Dismiss this appeal pursuant to 760 CMR 30.07(4) and 31.07(1)(h). The Board claims that the Committee lacks subject matter jurisdiction because the Board's decision is consistent with local needs under the Related Application provision of 760 CMR 31.07(1)(h).

The Board alleges that Apple Farm filed its comprehensive permit application at issue in this appeal on October 13, 2003, and that it filed an application and ANR (Approval Not Required) plan with the Medway Planning Board on August 18, 2004 for the same premises. The Board contends that the later ANR application is a "Related Application" within the meaning of 760 CMR 31.07(1)(h). That regulation states:

> (h) Related Applications. A decision by the Board to deny a comprehensive permit or grant a permit with conditions shall be consistent with local needs if 12 months has not elapsed between the date of application and any of the following:
> 1. the date of filing of a prior application for a variance, special permit, subdivision or other approval related to construction on the

> same land if that application included no low or moderate income housing,
>
> 2. any date during which such an application was pending before a local permit granting authority,
> 3. the date of disposition of such an application, or
> 4. the date of withdrawal of such an application.
>
> An application shall not be considered a prior application if it concerns insubstantial construction or modification of the preexisting use of the land.

The Board argues that 760 CMR 31.07(1)(h) must be read to include applications subsequent to the filing of the comprehensive permit application. It claims that because the words "prior application" appear in 31.07(1)(h)(1), but not 31.07(1)(h)(2)-(4), the latter subsections are not limited to prior applications, and therefore would contemplate the alleged ANR filing. Thus, it claims, Apple Farms has violated the related application provision and the Board's denial must be presumed to be consistent with local needs.[1]

Apple Farms argues that 760 CMR 31.07(1)(h) applies only to applications submitted before a comprehensive permit application is filed, and that an ANR plan is not a filing for an "approval" covered by the regulation.

A common sense reading of the regulatory language shows that the term "such an application," which appears in 760 CMR 31.07(1)(h)(2)-(4), must refer to "prior application" in 31.07(1)(h)(1). To make sense of the provision, it must be construed to incorporate the definition of the type of application considered in 31.07(1)(h)(1) to be related: "application for a variance, special permit, subdivision or other approval related to construction on the same land if that application included no low or moderate income housing." If the term "such an application" simply referred to the title of 30.07(1)(h), "Related Applications," as the Board suggests, there would be no identification of what

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1. A denial of a comprehensive permit when a developer has made a related application creates an irrebuttable presumption that the board's action is consistent with local needs. 760 CMR 31.07(1).

constituted a related application. Moreover, as the developer notes, the Board's interpretation would eliminate the exclusion of insubstantial construction or modifications from the related application definition for subsections (h)(2)-(4), while maintaining it for subsection (h)(1). This would lead to the illogical result that a Board could not rely on this provision to deny a comprehensive permit because of a prior application for an "insubstantial construction or modification of preexisting use of land" under 760 CMR 30.07(1)(h)(1), but its denial of a comprehensive permit based on the pendency of a later filed application for the same insubstantial construction or modification would be presumed, irrebuttably, to be consistent with local needs. The Board's reading of the regulation thus would require a distortion of both the plain meaning of the regulation and its purpose, which is to discourage the use of a comprehensive permit application as a threat to induce local board approval of conventional subdivisions.[2]

Accordingly, the developer's ANR application does not constitute a related application under 760 CMR 31.07(1)(h). The Board's motion to dismiss is denied.

Housing Appeals Committee

Date: February 16, 2005

Shelagh A. Ellman-Pearl
Presiding Officer

2. The question of whether an ANR plan is a plan for an "approval" need not be addressed at this time.